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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-1099

CHESTER BASS,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition for Writ of Certiorari
To The Court of Criminal Appeals of Texas

BRIEF IN OPPOSITION

JOHN L. HILL
Attorney General of Texas

LARRY F. YORK
First Assistant

JOE B. DIBRELL
Assistant Attorney General

LONNY F. ZWIENER
Assistant Attorney General

THOMAS M. POLLAN
Assistant Attorney General

Attorneys for Respondent

P. O. Box 12548, Capitol Station
Austin, Texas 78711

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BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas, for which review is sought here, is reported in *Bass* v. *State*, 501 S.W.2d 643 (1973). A copy of the opinion is attached to the Petition herein.

JURISDICTION

The formal jurisdictional requisites of the petition and its timely filing would appear to be satisfied although Respondent disputes Petitioner's contention that any rights guaranteed by the Constitution of the United States have been denied.

QUESTIONS PRESENTED

(1) Whether the Court of Criminal Appeals of Texas properly affirmed the judgment of the state district court below as Petitioner failed to present the issue of notice to the court on direct appeal?

(2) Whether Petitioner had sufficient notice that he had violated a condition of his probation so as not to deprive him of due process of law?

(3) Whether the Court of Criminal Appeals of Texas properly held that Petitioner's constitutional right not to be placed twice in jeopardy for the same offense was not violated when the trial court revoked his probation in a second probation revocation proceeding?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner contends that the Fifth, Sixth and Fourteenth Amendments to the Constitution of the

United States are involved, as well as Article 1427, Texas Penal Code (1925) and Article 42.12, Texas Code of Criminal Procedure. These provisions are included in the appendix of the Petition herein.

Respondent believes that Article 40.09, Texas Code of Criminal Procedure and Rule 9, Rules of the Court of Criminal Appeals of Texas are also involved, and Respondent has included these provisions in the appendix to this Brief in Opposition.

STATEMENT OF THE CASE

The Petition for the Writ of Certiorari results from the affirmance by the Court of Criminal Appeals of Texas of an order of the 178th Judicial District Court of Harris County, Texas revoking Petitioner's probation. On October 27, 1966 Petitioner was convicted of theft of filed papers pursuant to Article 14.27, Texas Penal Code (1925), and Petitioner was assessed a seven years probated sentence. One of the terms of Petitioner's probation was that he violate no law. Petitioner's probation was revoked on February 18, 1972, after the trial court conducted a hearing and found that the Petitioner had committed the offense of misdemeanor embezzlement.

Petitioner's original conviction occurred on December 16, 1964, and this conviction was affirmed on appeal on February 14, 1968. See *Bass* v. *State*, 427

S.W.2d 624 (Tex.Crim.App. 1968). The subsequent misdemeanor embezzlement offense was committed by the Petitioner on or about August 31, 1968. The state then filed a motion and subsequent motions to revoke probation, the first motion being filed on December 16, 1968. The cause was originally set for March 20, 1969, but the cause was subsequently reset five times and a hearing was finally held on February 9, 1970. After hearing the evidence, the trial court in its discretion refused to revoke the probation, and the probation remained in effect under the original terms and conditions.

On January 20, 1971, the Court of Criminal Appeals of Texas affirmed Petitioner's misdemeanor embezzlement conviction in *Bass* v. *State*, 464 S.W.2d 668 (Tex.Crim.App. 1971). On October 7, 1971, the state then filed an amended motion to revoke probation. The cause was set for a hearing on January 6, 1972, but it was subsequently reset three times and heard on February 18, 1972. The hearing resulted in Petitioner's probation being revoked. Petitioner then appealed to the Court of Criminal Appeals of Texas, and his brief primarily raised the question of double jeopardy as a result of the state's motions to revoke probation which alleged the same offense. The Petitioner in his brief in that court made no mention of the question of adequate notice. It was only after the Court of Criminal Appeals of Texas handed down its opinion that Petitioner attempted to present the notice issue to the court.

I.

ARGUMENT AND AUTHORITIES

Whether the Court of Criminal Appeals of Texas properly affirmed the judgment of the state district court below as Petitioner failed to present the issue of notice to the Court on direct appeal.

Petitioner complains that he was not given adequate notice that he had violated a condition of his probation, but Respondent would show that Petitioner never presented this point to the Court of Criminal Appeals of Texas on appeal, therefore Petitioner effectively waived this contention. On page 8 of Petitioner's Petition for Writ of Certiorari, he admits that he did not present the question of whether he was given sufficient notice to the Court of Criminal Appeals in his original appeal of this cause. Petitioner then states that he presented this issue in his motion for rehearing, which he admits that he did not have a statutory right to file. Petitioner effectively waived his right to present the question of waiver to the Court of Criminal Appeals of Texas, and now he attempts to argue that this issue was adequately presented to that Court.

Article 40.09 of the Texas Code of Criminal Procedure, Section 9 provides in regard to the filing of the Defendant's brief:

"This brief shall set forth separately each ground of error which Defendant desires to complain on

appeal and may set forth such argument as he deems appropriate. Each ground of error shall briefly refer to that part of the ruling of the trial court, charge given to the jury, or charge refused, admission or rejection of evidence or other proceedings which are designated to be complained of in such a way as that the point of objection can be clearly identified and understood by the court. If the Defendant includes in his brief arguments supporting a particular ground of error they shall be construed with it in determining what point of objection is sought to be presented by such ground of error; and if the court, upon consideration of such ground of error in the light of the arguments made in support thereof in the brief, can identify and understand such point of objection the same shall be reviewed not withstanding any generality, vagueness or other technical defect that may exist in the language employed to set forth such ground of error." (See Appendix to this Brief in Opposition for complete text).

A review of the state trial record reveals that the Petitioner complained in the trial court of the question of notice, but simply failed to preserve this point on appeal.

The Court of Criminal Appeals of Texas has promulgated rules of procedure pursuant to Article 44.33 of the Texas Code of Criminal Procedure. The court has promulgated Rule 9 which provides in part "Motions for rehearing may not be filed as a matter of right." (The text of Rule 9 has been set out in the Appendix to this Brief in Opposition). It is clear that the

Petitioner did not present this point of error to the Court of Criminal Appeals, and therefore the point was waived as Petitioner's mere filing of the point in a motion for rehearing did not place this point before the court.

It is clear that under state procedure, Petitioner did not present the question of notice to the Court of Criminal Appeals in a proper and timely manner. While it is conceded that no particular form of words or phrases is necessary, the claim must be brought to the attention of the state court with fair precision and in due time. *Street* v. *New York*, 394 U.S. 576 (1968); *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63 (1928). The record in the instant case fails to show that Petitioner presented the question of notice to the Court of Criminal Appeals of Texas, and as such the Petition should not be granted. *Newsom* v. *Smyth*, 365 U.S. 604 (1961).

II.

The Petitioner had sufficient notice that he violated a condition of his probation so as not to deprive him of due process of law.

Even if Petitioner presented the question of notice to the Court of Criminal Appeals, he has not shown any deprivation of a federal constitutional right as he had sufficient notice of why his probation was being revoked. It must be remembered that the state trial

court revoked Petitioner's probation on February 18, 1972. Probation was revoked, after Petitioner was afforded a hearing. Petitioner had counsel during the revocation hearing. Respondent concedes that Petitioner did not have a preliminary hearing, but Petitioner was not harmed by the failure to provide such a hearing. Furthermore, the probation revocation having taken place February 18, 1972, was held prior to this Court's decisions in *Morrissey* v. *Brewer*, 408 U.S. 471 (1972) and *Gagnon* v. *Scarpelli*, ___ U.S. ___, 93 S.Ct. 1756 (1973). It is Respondent's position that *Morrissey* does not apply retroactively, especially based on this Court's statement that it was to apply ". . . to future revocations of parole . . ." (408 U.S. at 490). See *Valdez* v. *Perini*, 474 F.2d 19 (6th Cir. 1973); *M'Clary* v. *California Adult Authority*, 466 F.2d 1122 (9th Cir. 1972); *Ex parte Ates*, 487 S.W.2d 353 (Tex.Crim.App. 1972).

There can be no question that Petitioner was entitled to notice of the revocation hearing and the reason for it, but it is clear that he had adequate notice from the state's pleadings to determine which criminal offense he had committed in violation of the conditions of his probation.

In each amended motion to revoke probation, which are attached to the Appendix of the Petition herein, the state alleged that the defendant had committed "the offense of misdemeanor embezzlement on or about

August 31, 1968, in Harris County, Texas . . ." The state's original motion and first amended motion to revoke probation further specified that the embezzlement resulted from Petitioner's taking $45.00 belonging to John Carter. It can hardly be argued that Petitioner did not have notice of the charge which was being used to revoke his probation.

In light of the circumstances, Petitioner is in no position to complain of lack of notice. It is clear that a motion to revoke under Texas law does not have to have the same particularity as contained in an indictment. *Kinard* v. *State*, 477 S.W.2d 896 (Tex.Crim.App. 1972). In each motion and amended motion to revoke probation, the state sufficiently alleged sufficient information to put Petitioner on notice of why his probation was being revoked. See *Campbell* v. *State*, 456 S.W.2d 918 (Tex.Crim.App. 1970).

III.

The Court of Criminal Appeals of Texas properly held that Petitioner's constitutional right not to be placed twice in jeopardy for the same offense was not violated when the trial court revoked his probation in a second probation revocation proceeding.

It is Respondent's contention that the question of double jeopardy is not applicable to parole revocation proceedings. See *Dunn* v. *California Department of Corrections*, 401 F.2d 340 (9th Cir. 1968).

As was stated in *Barber* v. *State*, 486 S.W.2d 352 (Tex.Crim.App. 1972):

> "A hearing upon a motion to revoke probation is addressed to the trial court's discretion in determining whether the probation shall be revoked or continued. The result of such hearing is neither conviction nor acquittal. (See McDonald v. State, 393 S.W.2d @ 14; Soliz v. State, 171 Tex.Cr.R. 376, 350 S.W.2d 566, 567). Thus Appellant's contention of jeopardy is without merit." 486 S.W.2d at 354.

It is clear from the above case that under Texas law, the hearing on a motion to revoke probation is a function of the trial court's discretion and involves only the question of whether the probation should be continued. At the first hearing, there had been no final conviction and the trial court declined to revoke even though under Texas law a revocation of probation may take place before a person has been convicted for the offense for which his probation was revoked. *Farmer* v. *State*, 475 S.W.2d 753 (Tex.Crim.App. 1972). Even though it was within the trial court's discretion to revoke the probation, the trial court exercised its discretion so as to continue the probation should the charges against the Petitioner subsequently either be dismissed or the Petitioner be acquitted of them. The trial court upon the filing of the state's amended motion to revoke probation after Petitioner's subsequent conviction for the misdemeanor embezzlement charge, held a hearing at which time the testimony adduced at the first hearing was admitted without objection. The state, in addition,

offered the information, judgment and sentence, and the mandate of affirmance of Petitioner's conviction for misdemeanor embezzlement. These additional instruments were admitted into evidence by the trial court. As a result, the trial court revoked the probation. Respondent submits that it would be unfortunate to punish the action of the trial court which attempted to protect the Petitioner by refusing to revoke his probation until the court had evidence that the offense for which the probation was revoked was a final conviction.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

LARRY F. YORK
First Assistant

JOE B. DIBRELL
Assistant Attorney General

LONNY F. ZWIENER
Assistant Attorney General

THOMAS M. POLLAN
Assistant Attorney General

Attorneys for Respondent

P O. Box 12548, Capitol Station
Austin, Texas 78711